119-495

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~328~~ 83

MOSES C. BIGNALL, PLAINTIFF IN ERROR,

vs.

JAMES H. GOULD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED OCTOBER 4, 1883.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 328.

MOSES C. BIGNALL, PLAINTIFF IN ERROR,

vs.

JAMES H. GOULD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the March term, 1883, thereof, between Moses C. Bignall, plaintiff, and James H. Gould, defendant, a manifest error hath happened, to the great damage of the said Moses C. Bignall, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Issued at office in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri.
By —— ——, *Deputy.*

Allowed by—
SAMUEL TREAT, *Judge.*

2 *Return to Writ.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court at office in the city of St. Louis this 16th day of June, A. D. 1883.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of Said Court.

[Endorsed:] No. 1857. United States circuit court, eastern district of Missouri. Moses C. Bignall *vs.* James H. Gould. Writ of error to the circuit court of the U. S., east'r. dist. of Missouri. Returned and filed 16th day of June, 1883. A. P. Selby, clerk.

3 The United States of America to James H. Gould, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein Moses C. Bignall is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 16th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

I hereby acknowledge service of this citation for defendant, J. H. Gould.

JAY F. TORREY,
Of Counsel for Defendant.

4 [Endorsed:] No. 1857. United States circuit court, eastern district of Missouri. Moses C. Bignall *vs.* James H. Gould. Citation. Filed June 16, 1883. A. P. Selby, clerk.

5 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States in and for the Eastern District of Missouri.

Be it remembered that on March 26th, A. D. 1883, at the regular March term of the circuit court of the United States for the eastern district of Missouri, there was filed by leave of court a certain amended petition, which said amended petition is in words and figures following, to wit:

Amended Petition.

United States Circuit Court, Eastern District of Missouri. Sept. Term, 1881.

MOSES C. BIGNALL, Plaintiff, *vs.* JAMES H. GOULD, Defendant.

And now comes Moses C. Bignall, plaintiff in the above-entitled cause, and by leave of court files this his amended petition, and says that he is a resident of the city of St. Louis, in the eastern district of the State of Missouri, and a citizen of the State of Missouri, and com-

plains of James H. Gould, residing and doing business in the village of Seneca Falls, in the State of New York, and a citizen of the State of New York, and says—

That heretofore, to wit, on or about the 11th day of April, 1879, at the said city of St. Louis, the said James H. Gould entered into bond under his hand and seal, herewith filed, whereby he bound himself, his heirs, executors, administrators, and assigns, to pay to the plaintiff, Moses C. Bignall, ten thousand dollars, to be void only upon the following conditions, to wit: That whereas on or before the 1st day of April, 1878, the said Moses C. Bignall became unable to pay and satisfy all his just debts and liabilities; and whereas
6 the Gould Manufacturing Co., of Seneca Falls aforesaid, was one of the creditors of the said Moses C. Bignall; and whereas the said Gould M'f'g Co., Mrs. Hannah B. Gould, of Seneca Falls, and Angus McDonald, of Rochester, N.Y., became the assignees by purchase of a large number and amount of said debts and claims then existing against the said Moses C. Bignall; and whereas the said last-named parties, or either of them, may deem it for their interest to become the assignees of other of said debts and claims now existing against the said Moses C. Bignall: Now, therefore, if the said Gould M'f'g Co., the said Hannah B. Gould, and the said Angus McDonald shall acquit, release, and discharge said Moses C. Bignall within one year from the date hereof of all and singular the debts and claims aforesaid that have been assigned to them or that may be assigned to them, or either of them, by good and sufficient releases in writing to be made by them and to be delivered by them to said Moses C. Bignall—

And the plaintiff further says that in case all of said conditions were not fulfilled as above expressed, then said bond was to remain in full force and effect.

That at that — he was owing about $50,000 to divers persons. The said Angus McDonald held at that date by assignment from many of plaintiff's creditors the sum of *of* $6,000 or thereabouts, an itemized statement of all of which plaintiff can ascertain is hereto attached and marked "B." And said Hannah B. Gould at said time held plaintiff's said debts by assignment from a large number of plaintiff's said creditors, $26,000 or thereabouts, an itemized statement of all of which plaintiff can ascertain is hereto attached and marked "C." And at said time the Gould M'f'g Co. was plaintiff's creditor to the amount of about $7,000.

7 Plaintiff further states that there has been a breach of said bond, in this, viz., that more than one year had elapsed before this suit was begun since the execution of said bond, and that neither said Gould M'f'g Co., said Hannah B. Gould, nor said Angus McDonald did, within said year or subsequently, acquit, release, or discharge this plaintiff from any of the debts or claims held, owned, or claimed by them mentioned in said bond, although demand has been made on them to do so.

Plaintiff says that by reason of the breach of said bond he has

been damaged in the sum of ten thousand dollars, and for other proper relief.

TAYLOR AND POLLARD,
Att'ys for Plaintiff.

EXHIBIT "B."

Claims Held by Angus McDonald against M. C. Bignall and the Parties from whom Assigned.

Candee, Ames & Co.	498 70
James Farman	9 80
Hamilton Rubber Co.	719 70
Iowa Farming & Tool Co.	242 71
Jennings Sanitary Depot	223 88
James Judson & Co.	203 39
Scaifs & Sons	404 55
Schultz Belting Co.	324 56
Spang, Shalfaut & Co.	396 96
Morris, Tasker & Co.	1,445 52
Bignall M'f'g Co.	219 08
Gutta Percha Rubber Co.	539 78
W. C. Vosburg & Co.	202 08

8 EXHIBIT "C."

Claims Held by Mrs. Hannah B. Gould against M. C. Bignall and the Parties from whom Assigned.

Shultz Belting Co.	4,033 80
Spang, Chatfaut & Co.	8,117 00
Pete, Valve & Co.	816 94
J. A. Calwell, Boston	954 67
Mo. Lead and Oil Co.	841 21
Kupferle & Boishen	147 23
J. A. Field, Son & Co.	890 71
W. B. Douglass	1,878 44
Stanley, Flagg & Co.	1,844 02
Schultz Belting Co. (notes)	3,709 24

And afterwards, to wit, on May 22d, 1883, there was filed the following answer to amended petition, to wit:

Answer.

United States Circuit Court, Eastern District of Missouri.

MOSES C. BIGNALL, Pl'ff, *vs.* JAMES H. GOULD, Def't.

The above-named defendant, by his attorneys, for answer to the above-named plaintiff's amended petition, says:

That it is true, as therein alleged, that said plaintiff lives in said St. Louis, and that this defendant lives in said New York.

That it is true, as alleged, that he executed said bond of April 11th, 1879, and that it contained the conditions set out in said petition.

That it is true, as alleged therein, that plaintiff at the date of the execution of said bond was owing about fifty thousand dollars to divers persons, and that said Angus McDonald held at that date, by assignment from many of plaintiff's creditors, the sum of six thousand dollars or thereabouts, and that the itemized statement attached to plaintiff's petition and marked "B" is a correct list of said claims; and that it is true, as therein alleged, that said Hannah B. Gould at said time held of plaintiff's said debts, by assignment from a large number of plaintiff's said creditors, twenty-six thousand dollars or thereabouts, and that the itemized statement thereof attached to plaintiff's petition and marked "C" is a correct list thereof; and that it is true, as therein alleged, that the Gould Manufacturing Co. was the plaintiff's creditor to the amount of about seven thousand dollars.

That it is true, as therein alleged, that more than one year had elapsed before this suit was begun since the execution of said bond, and that neither said Gould's Manufacturing Co., said Hannah B. Gould, nor said Angus McDonald, had, within said year, or subsequently, acquitted, released, or discharged the plaintiff herein from any of the debts or claims held, owned, or claimed by them mentioned in said bond, but that it is not true, as alleged that demand was or has been made at said time, or any other time, to discharge said claims, or any of them.

That it is not true that by reason of the breach of said bond plaintiff has been damaged in said sum of ten thousand dollars, or any other sum.

That there was no consideration for the execution of said bond.

Wherefore defendant prays to be hence dismissed with his costs.

And, further answering, defendant says that on April 25th, 1878, proceedings in bankruptcy were instituted against plaintiff in the district court of the United States for the eastern district of Missouri by a large number of his then creditors, and that thereafter, and in pursuance thereof, and on April 25th, 1879, plaintiff was adjudicated a bankrupt, and thereafter, and on September 15th, 1879, and prior to the commencement of the proceedings herein, he, said plainfiff, was, by said district court, discharged in bankruptcy, and awarded a certificate thereof.

That all of said claims set forth in the papers referred to in plaintiff's said amended petition as "B" & "C," and the claim of said Gould's Manufacturing Co., also referred to therein, were fully set out in the schedule filed by plaintiff at the time that said proceedings were instituted, and that said claims so included in said lists as "B" & "C," and of the Gould's Manufacturing Co., were not debts created by the fraud or embezzlement of said plaintiff, or by his defalcation as a public officer, or while acting in any fiduciary capacity, but such as would be fully discharged and acquitted by a discharge in bankruptcy, and said claims were discharged, and said plaintiff acquitted thereof by his said discharge in bankruptcy.

Defendant therefore says that he is not liable to plaintiff in any sum, because each and every one of said claims referred to or set out in plaintiff's amended petition were fully discharged on his own application, and within one year after the execution of said bond by operation of law.

Wherefore defendant prays to be hence dismissed with his costs.

And further answering, defendant says that subsequent to
11 the institution of said proceedings in bankruptcy against plaintiff, and prior to said adjudication, and on said date of the execution of said bond by him, he and plaintiff, both believing that said proceedings in bankruptcy against plaintiff would be dismissed, entered into an agreement wherein and whereby plaintiff conveyed to defendant certain of his assets which had theretofore been by him included in his said schedule as a part of his assets, and, in consideration of said transfer of said assets to him, defendant agreed that said Angus McDonald, Hannah B. Gould, and the Gould Manufacturing Co. should discharge said claims against the plaintiff herein, and for the better securing said plaintiff against said claims entered into the bond here sued on. But defendant says that by reason of said subsequent adjudication contrary to said expectations of this plaintiff and defendant, said agreement was rendered inoperative and void, and that subsequent to said adjudication plaintiff's assignee in bankruptcy instituted proceedings against this defendant, and recovered from him said assets so conveyed by plaintiff to him, in consideration for which he agreed that said claims should be discharged as aforesaid, and to secure which last said agreement he executed said bond.

Defendant therefore says that there was a failure of the consideration for which said bond was given.

Wherefore defendant prays to be hence dismissed with his costs.

JAY L. TORREY,
DYER, LEE & ELLIS,
Attorneys for Defendant.

12 And afterwards, to wit, on May 23rd, A. D. 1883, there was filed the following replication, to wit:

Replication.

MOSES C. BIGNALL *vs.* JAMES H. GOULD.

Comes now the plaintiff herein, and, for replication to def't's answer, denies each and every allegation thereof.

TAYLOR AND POLLARD,
Atty's for Pl'ff.

And afterwards, to wit, on June 7th, 1883, the following further proceedings were had in said case, to wit:

Judgment.

MOSES C. BIGNALL, Plaintiff,
vs.
JAMES H. GOULD, Defendant. } 1857.

Now comes the plaintiff, by attorney, and also comes said defendant, by his attorney, the plaintiff by Taylor and Pollard, the defendant by Jay L. Torrey and John P. Ellis, and this cause coming on for hearing the same is submitted to the court without the intervention of a jury upon the pleadings, proofs, and arguments of counsel, upon consideration whereof, and being fully advised in the premises, the court finds the issues for the plaintiff, and assesses his damages at the sum of one cent.

It is therefore considered by the court that the plaintiff, Moses C. Bignall, have and recover of the defendant, James H. Gould, the sum of one cent, the damages aforesaid by the court assessed, and that the costs herein — be expended be taxed against said plaintiff.

13 And afterwards, to wit, on the same day, June 7th, 1883, the following further proceedings were had in said cause, to wit:

Motion for a New Trial Filed.

MOSES C. BIGNALL, Plaintiff,
v.
JAMES H. GOULD, Defendant. } 1857.

Now comes the plaintiff by attorney, and files motion for a new trial herein.

And afterwards, to wit, on June 9th, 1883, the following further proceedings were had in said cause, to wit:

Motion for New Trial Overruled.

MOSES C. BIGNALL, Plaintiff,
v.
JAMES H. GOULD, Defendant. } 1857.

Now come the parties by their attorneys, and the court, having considered the plaintiff's motion for a new trial heretofore filed, orders that said motion be overruled.

Bill of Exceptions Filed.

And thereupon the said plaintiff presents to the court his bill of exceptions, which is allowed, signed, and ordered to be filed and made part of the record herein.

And afterwards, to wit, on June 16th, 1883, the following further proceedings were had in said cause, to wit:

Writ of Error, Citation, and Bond Filed & Approved.

MOSES C. BIGNALL, Plaintiff,
v.
JAMES H. GOULD, Defendant. } 1857.

Now comes the plaintiff by attorney, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defend-
14 ant to be and appear at a Supreme Court of the United States, at the next term thereof, on the second Monday of October, next; which said writ of error is allowed, and said citation signed by the judge. And the said plaintiff also presents to the court his bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as part of the record herein.

Said bond is in words and figures following, to wit:

15 *Bond.*

Know all men by these presents that we, Moses C. Bignall, as principal, and Sam. Slawson and Walter Slawson, as sureties, are held and firmly bound unto James H. Gould in the full and just sum of five hundred dollars, to be paid to the said James H. Gould, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 14th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

Whereas lately at the March term, 1883, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between Moses C. Bignall, plaintiff, and James H. Gould, defendant, judgment was rendered against the said Moses C. Bignall, and the said Moses C. Bignall having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James H. Gould, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Moses C. Bignall shall prosecute said writ to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

MOSES C. BIGNALL. [SEAL.]
SAM. SLAWSON. [SEAL.]
WALTER SLAWSON. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved by—
SAMUEL TREAT, *Judge.*

16 UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

Sam. Slawson and Walter Slawson, obligors in the within bond, being duly sworn, on their oath depose and say that they are each worth, over and above their debts and liabilities, the sum of two thousand dollars, and that they own property to that amount, subject to execution, within the State of Missouri.

WALTER SLAWSON.
SAM. SLAWSON.

Subscribed and sworn to by said Walter Slawson and Sam. Slawson, the above-named affiants, this 14th day of June, A. D. 1883, before me, at office in the city of St. Louis.

A. P. SELBY,
Com'r U. S. Cir. Court, E. Dist. Mo.

[Endorsed:] No. 1857. United States circuit court, eastern district of Missouri. Moses C. Bignall *vs.* James H. Gould. Bond, $500. ——, principal; ——, ——, sureties. Filed 16th day of June, 1883. A. P. Selby, clerk.

17 Said bill of exceptions filed as aforesaid is in words and figures following, to wit:

Bill of Exceptions.

In the United States Circuit Court, Eastern District of Missouri.

MOSES C. BIGNALL *vs.* JAMES H. GOULD.

Be it remembered that on this the seventh day of June, 1883, the above-entitled cause came on to be heard by the court, a jury having been waived by stipulation in writing duly signed.

The plaintiff, to sustain the issues on his part, offered and read in evidence the bond sued on, which is in words and figures as follows, to wit:

Bond.

"Know all men that I, James H. Gould, of Seneca Falls, New York, are held and firmly bound to Moses C. Bignall in the penal sum of ten thousand dollars, lawful money, liquidated damages, to the payment of which I bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

"Sealed with my seal, at the city of St. Louis and State of Missouri, this 7th day of April, A. D. 1879.

"The condition of this obligation is such that whereas, on the 1st day of April, 1878, the said Moses C. Bignall became unable to pay and satisfy all his just debts and liabilities, and whereas the Gould Manufacturing Company, of Seneca Falls aforesaid, was one of the creditors of the said Moses C. Bignall, and whereas the said Gould Manufacturing Company, Mrs. Hannah B. Gould, of Seneca Falls,

and Angus McDonald, of Rochester, N. Y., became the assignees by purchase of a large number and amount of the said debts
18 and claims then existing against the said Moses C. Bignall, and whereas said last-named parties, or either of them, may deem it to their interest to become the assignees of other of said debts and claims now existing against said Moses C. Bignall:

"Now, therefore, if the said Gould Manufacturing Company, the said Hannah B. Gould, and the said Angus McDonald shall acquit, release, and discharge the said Moses C. Bignall within one year from the date hereof of all and singular the debts and claims aforesaid, and have been assigned to them, or that may hereafter be assigned to them, or either of them, by good and sufficient release in writing, to be made by them, and to be delivered by them to said Moses C. Bignall, then this obligation to be void; otherwise it shall remain in full force and virtue.

"(Signed) JAMES H. GOULD. [SEAL.]"

Plaintiff proved by Hugo Muench that he was the assignee of Bignall in bankruptcy, and that as such assignee there came into his hands the sum of $177.04 in 1880, and $5,000 in June, 1881, and $12,439.11 in October, 1881, and $5,493.39 in March, 1882, making a total of $23,109.54, and no more was ever received by him as such assignee; that of the sums so received by him there was collected $17,439.11 of the Gould Manufacturing Co.; that he paid no dividend until March 14th, 1882, at which time there was a dividend paid, so that each creditor received forty-six cents and $\frac{65}{100}$ of a cent on the dollar, and no more; that said dividend was the final one, and immediately after paying the same said estate was closed and he was discharged.

It was admitted in open court that no creditor was paid
19 more than 46 cents & $\frac{65}{100}$ of a cent on the dollar.

Here the plaintiff rested.

The defendant offered no evidence, but relied upon the following admissions made by the plaintiff in open court:

First. That proceedings were begun against the plaintiff for an adjudication in bankruptcy April 25th, 1878.

Second. That the plaintiff was adjudicated a bankrupt April 25th, 1879.

Third. That the plaintiff obtained his discharge under the bankrupt act May 6th, 1880; that he filed his petition therefor November 13th, 1879.

No other testimony was given nor admissions made at the trial save those contained in the pleadings.

The plaintiff then asked the court to declare the following propositions of law as applicable to this case, to wit:

1st. The bond sued on is a liquidated bond, and, the breach being admitted by the defendant, plaintiff is entitled to recover the liquidated sum, $10,000.

2nd. That if the bond is not a liquidated bond, still, under the issues and the evidence, plaintiff is entitled to recover more than

nominal damages, notwithstanding plaintiff's discharge in bankruptcy.

The court refused thus to declare the law, and the plaintiff then and there duly excepted.

The court thereupon rendered judgment for the plaintiff, and assessed his damages at one cent only.

Plaintiff excepted to the action of the court in assessing only nominal damages, and on the same day filed a motion to set aside the
20 judgment and for a new trial, which motion was in words and figures as follows, to wit:

Motion for a New Trial and to Set Aside Judgment.

M. C. BIGNALL *vs.* J. H. GOULD.

Comes now the plaintiff, and asks the court to set aside the judgment and grant him a new trial herein for the following reasons, to wit:

1st. Because the court erred in holding the bond sued on to be penal instead of a liquidated damage bond.

2nd. Because the court erred in not granting the declarations of law asked by the plaintiff.

3rd. Because the finding and judgment of the court is for nominal instead of substantial damages.

(Signed) TAYLOR & POLLARD,
Att'ys for the Plaintiff.

That on the 8th day of June, 1883, the court having considered said motion overruled the same; and the plaintiff then and there objected and excepted to the action of the court in overruling said motion.

Plaintiff tenders this his bill of exceptions, and prays the court to allow, sign, and seal the same that it may become a part of the record, which is accordingly done in open court this 8th day of June, 1883.

SAMUEL TREAT. [SEAL.]

21 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 1857 of M. C. Bignall, plaintiff, against James H. Gould, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 5th day of September, in the year of our Lord eighteen hundred and eighty-three.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.
By T. L. CRAWFORD, *Deputy.*

22 [Endorsed:] No. 1857. United States circuit court, eastern district of Missouri. Moses C. Bignall against James H. Gould. Duly certified transcript of the record and proceedings in the above-entitled cause.

23 [Endorsed:] 1857. From U. S. circuit court, east. dist. of Mo. Moses C. Bignall *vs.* James H. Gould. Transcript to U. S. Supreme Court.

Endorsed on cover: E. Missouri C. C. U. S. No. 328. Moses C. Bignall, plaintiff in error, *vs.* James H. Gould. Filed 4th October, 1883.

119-495

Office Supreme Court U. S.
FILED.
OCT 16 1886
JAMES H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

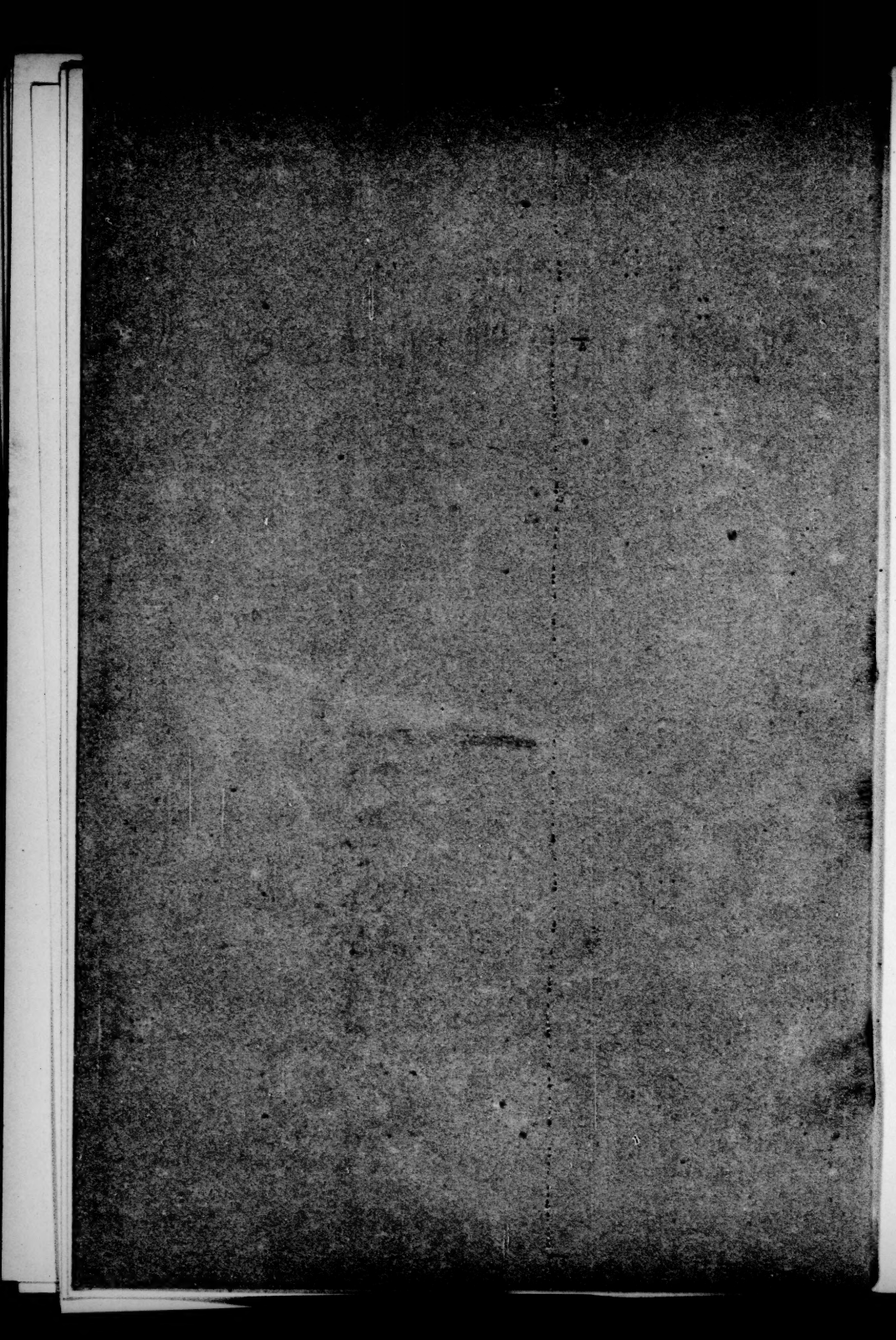
MOSES C. BIGNALL,
Plaintiff in Error,
vs.
JAMES H. GOULD,
Defendant in Error.
} *No.*

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

H. M. POLLARD,
Counsel for Plaintiff in Error.

With whom is

S. N. TAYLOR.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

MOSES C. BIGNALL,
Plaintiff in Error,
vs.
JAMES H. GOULD,
Defendant in Error.
} *No.*

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This was an action for a breach of the following bond, viz.:

"Know all men that I, James H. Gould, of Seneca Falls, New York, are held and firmly bound to Moses C. Bignall in the penal sum of ten thousand dollars, lawful money, liquidated damages, to the payment of which I bind myself, my heirs, executors, administrators, and assigns, firmly by these presents.

"Sealed with my seal, at the City of St. Louis and State of Missouri, this 7th day of April, A. D. 1879.

"The condition of this obligation is such that, whereas, on the 1st day of April, 1878, the said Moses C. Bignall became unable to pay and satisfy all his just debts and liabilities, and whereas, the Gould Manufacturing Company, of Seneca Falls aforesaid, was one of the creditors of the said Moses C. Bignall, and whereas, the said Gould Manufacturing Company, Mrs. Hannah B. Gould, of Seneca Falls, and Angus McDonald, of Rochester, New York, became the assignees by purchase of a large number and amount of the said debts and claims then existing against the said Moses C. Bignall, and whereas, said last named parties, or either of them, may deem it to their interest to become the assignees of other of said debts and claims now existing against said Moses C. Bignall:

"Now, therefore, if the said Gould Manufacturing Company, the said Hannah B. Gould, and the said Angus McDonald, shall acquit, release, and discharge the said Moses C. Bignall within one year from the date hereof, of all and singular the debts and claims aforesaid, that have been assigned to them, or that may hereafter be assigned to them, or either of them, by good and sufficient release in writing, to be made by them, and to be delivered by them to said Moses C. Bignall, then this obligation to be void; otherwise it shall remain in full force and virtue.

"[Signed] JAMES H. GOULD. [Seal.]"

The petition, after aptly setting out the execution of the bond, alleged that the plaintiff was, at the date of said bond, "owing about $50,000 to divers persons. The said Angus McDonald held at the date, by assignment from many of plaintiff's creditors, the sum of $6,000, or thereabouts, an itemized statement of all of which plaintiff can ascertain, is hereto attached and marked 'B.' And said Hannah B. Gould at said time held plaintiff's said debts, by assignment from a large number of plaintiff's said creditors, $26,000, or thereabouts, an itemized

statement of all of which plaintiff can ascertain, is hereto attached and marked 'C.' And at said time the Gould Manufacturing Company was plaintiff's creditor to the amount of about $7,000.

"Plaintiff further states that there has been a breach of said bond, in this, viz.: that more than one year had elapsed before this suit was begun since the execution of said bond, and that neither said Gould Manufacturing Company, said Hannah B. Gould, nor said Angus McDonald did, within said year, or subsequently, acquit, release, or discharge this plaintiff from any of the debts or claims held, owned, or claimed by them, mentioned in said bond, although demand has been made on them to do so.

"Plaintiff says that by reason of the breach of said bond he has been damaged in the sum of ten thousand dollars, for which and for other proper relief, he asked judgment."

Said exhibits B and C, attached to and made a part of said petition, set out the names and amounts of claims against plaintiff assigned to and held by Angus McDonald and Hannah B. Gould, respectively. Record, p. 4.

The defendant, answering, admitted all the allegations of the petition, except that alleging that plaintiff was damaged, which was denied. The answer then set up the following, viz.:

"That there was no consideration for the execution of said bond. Wherefore defendant prays to be hence dismissed with his costs. And, further answering, defendant says that on April 25th, 1878, proceedings in bankruptcy were instituted against plaintiff in the District Court of the United States for the Eastern District of Missouri, by a large number of his then creditors, and that thereafter, and in pursuance thereof, and on April

25th, 1879, plaintiff was adjudicated a bankrupt, and thereafter, and on September 15th, 1879, and prior to the commencement of the proceedings herein, he, said plaintiff, was, by said district court, discharged in bankruptcy, and awarded a certificate thereof.

"That all of said claims set forth in the papers referred to in plaintiff's said amended petition as 'B' and 'C,' and the claim of said Gould Manufacturing Company, also referred to therein, were fully set out in the schedule filed by plaintiff at the time that said proceedings were instituted, and that said claims so included in said list as 'B' and 'C,' and of the Gould Manufacturing Company, were not debts created by the fraud or embezzlement of said plaintiff, or by his defalcation as a public officer, or while acting in any fiduciary capacity, but such as would be fully discharged and acquitted by a discharge in bankruptcy, and said claims were discharged, and said plaintiff acquitted thereof by his said discharge in bankruptcy.

"Defendant therefore says that he is not liable to plaintiff in any sum, because each and every one of said claims referred to or set out in plaintiff's amended petition were fully discharged on his own application, and within one year after the execution of said bond, by operation of law.

"Wherefore defendant prays to be hence dismissed with his costs.

"And further answering, defendant says that subsequent to the institution of said proceedings in bankruptcy against plaintiff and prior to said adjudication, and on said date of the execution of said bond by him, he and plaintiff, both believing that said proceedings in bankruptcy against plaintiff would be dismissed, entered into an agreement wherein and whereby plaintiff conveyed to defendant certain of his assets which had theretofore

been by him included in his said schedule as a part of his assets, and, in consideration of said transfer of said assets to him, defendant agreed that said Angus McDonald, Hannah B. Gould, and the Gould Manufacturing Co. should discharge said claims against the plaintiff herein and for the better securing said plaintiff against said claims entered into the bond here sued on. But defendant says that by reason of said subsequent adjudication, contrary to said expectations of this plaintiff and defendant, said agreement was rendered inoperative and void, and that subsequent to said adjudication plaintiff's assignee in bankruptcy instituted proceedings against this defendant, and recovered from him said assets so conveyed by plaintiff to him, in consideration for which he agreed that said claims should be discharged as aforesaid and to secure which last said agreement he executed said bond."

There was a replication denying all the allegations of the answer.

The case was tried by the court. The plaintiff in error put in evidence the bond sued on and then proved by Hugo Muench, "that he was the assignee of Bignall in bankruptcy, and that as such assignee there came into his hands the sum of $177.04 in 1880, and $5000 in June 1881; and $12,439.11 in October 1881, and $5,493.39 in March 1882, making a total of $23,109.54, and no more was ever received by him as such assignee; that of the sums so received by him there was collected $17,439.11 of the Gould Manufacturing Co.; that he paid no dividend until March 14th, 1882, at which time there was a dividend paid, so that each creditor received forty-six cents and 65-100 of a cent on the dollar, and no more; that said dividend was the final one, and that immediately after paying the same said estate was closed and he was discharged."

It was admitted in open court that no creditor was

paid more than 46 cents and 65-100 of a cent on the dollar.

Here the plaintiff in error rested.

The defendant in error offered no evidence, but relied upon the following admissions made by the plaintiff in error in open court:

"*First.* That proceedings were begun against the plaintiff for an adjudication in bankruptcy April 25th, 1878.

"*Second.* That the plaintiff was adjudicated a bankrupt April 25th, 1879.

"*Third.* That the plaintiff obtained his discharge under the bankrupt act May 6th, 1880; that he filed his petition therefor November 13th, 1879."

No other testimony was given nor admissions made at the trial, save those contained in the pleadings.

The plaintiff in error then asked the court to declare the following propositions of law as applicable to this case, to wit:

"1st. The bond sued on is a liquidated bond, and, the breach being admitted by the defendant, plaintiff is entitled to recover the liquidated sum, $10,000.

"2d. That if the bond is not a liquidated bond, still, under the issues and the evidence, plaintiff is entitled to recover more than nominal damages, notwithstanding plaintiff's discharge in bankruptcy."

The court refused thus to declare the law, and the plaintiff in error then and there duly excepted.

The court thereupon rendered judgment for the plaintiff in error, and assessed his damages at one cent only.

Plaintiff in error excepted to the action of the court in assessing only nominal damages, and on the same day filed a motion to set aside the judgment and for a new trial, for the following reasons:

"1st. Because the court erred in holding the bond sued on to be penal instead of a liquidated damage bond.

"2d. Because the court erred in not granting the declarations of law asked by the plaintiff.

"3d. Because the finding and judgment of the court is for nominal instead of for substantial damages."

Which motions were overruled and the plaintiff in error brings his cause to this court on a writ of error.

ASSIGNMENT OF ERRORS.

The trial court erred in holding that the bond sued on was not for liquidated damages.

It erred in refusing plaintiff's instructions.

It erred in giving plaintiff only nominal damages.

It erred in overruling plaintiff's motion for a new trial.

STATEMENT OF POINTS.

I.

The bond sued on is for liquidated damages and not penal.

II.

The plaintiff was actually damaged by the breach of the bond, and whether liquidated or penal, was entitled to a substantial recovery.

BRIEF.

I.

In determining whether a bond is for penal or liquidated damages, the following rules are to be invoked, viz:

1. The intention of the parties must be derived from the language of the bond, and if that is clear and indisputable the court will be governed thereby. If the language of the bond leaves the matter in doubt, then—

2. If the actual damages cannot be ascertained or measured by any standard, then the parties will be held to have measured the damages for the breach of the conditions specified, unless—

3. The sum agreed upon is either grossly inadequate to the damages occasioned, or is so greatly in excess of such damages as to shock the mind of the court.

With these propositions in view, we maintain that the following authorities support the view that the will of the parties is clearly expressed in the bond that $10,000 should be the exact and liquidated sum which should be paid by the defendant-in-error, in case he violated the conditions specified;

In Lowe vs. Peers, 4 Burr, 2225, where the suit was on this bond, viz: "I do hereby promise Mrs. Lowe that I will not marry with any other person beside herself. If I do, I hereby agree to pay the said Mrs. Lowe £1000 within three months next after I shall marry anybody else." Lord Mansfield, the whole court concurring, held this liquidated damages, saying: "Here the deed itself liquidated the certain sum; it was ascertained and fixed between the parties themselves, and was, therefore, the true and proper quantum of the damages."

Story, in his Eq. Juris., §1318, says. "Courts of equity

will not interfere where the parties have liquidated their damages; provided the damages do not assume the character of gross extravagance. But, on the other hand, courts of equity will not suffer their jurisdiction to be evaded by the fact that the parties call the sum 'damages.' when in fact it is a penalty.

Leary vs. Laflin, 101 Mass, 334: Bond of lessee for $1000 liquidates damages for the running of a livery stable in a satisfactory manner, and returning in good condition to plaintiff, the lessor—held liquidated. Judge Colt says: "From the nature of the case the actual damages resulting from a breach of his agreement are not capable of being ascertained by any satisfactory and known rule, and it was manifestly the intention, as it was clearly within the power of the parties, not to leave them to the uncertain estimate of the jury, but to fix them by express agreement.

In Cotheal vs. Talmage, 9 N. Y. 551, it was held that where the damages resulting from a breach of an agreement are in their nature indefinite and uncertain, and a specific sum has bsen mentioned, such sum will be regarded as damages and not a penalty, unless the amount be greatly disproportioned to any probable estimate of the actual damages, and the sum so fixed will be considered as damages, although by the terms of the agreement it is to be paid on the breach of any one of the several stipulations of different degrees of importance, when the damages arising from the breach of each of them would be in their nature indefinite. In that case there were several acts stipulated to be done, but the court held the bond to be one for liquidated damages.

To same purport Bagley vs. Peddie, 16 N. Y., 469.

In Clement vs. Cash, 21 N. Y. 253, the court, at page 257, says:

"When the parties to a contract, in which the damages

to be ascertained, growing out of the breach, are uncertain in the amount, mutually agree that a certain sum shall be damages in case of a failure to perform, and in language plainly expressive of such agreement, I know of no sound principle or rule applicable to the construction of contracts, that will enable a court of law to say that they intended something else. Where the sum fixed is greatly disproportionate to the presumed actual damage, probably a court of equity may relieve; but a court of law has no right to erroneously construe the intention of parties, when clearly expressed, in the endeavor to make better contracts for them than they have made for themselves. In these, as in all other cases, the courts are bound to ascertain and carry into affect the true intent of the parties. I am not disposed to deny that a cause may arise in which it is doubtful from the language employed in the instrument, whether the parties meant to agree upon the measure of compensation to the injured party in case of a breach. In such cases there would be room for construction; but certainly none where the meaning of the parties was evident and unmistakable. When they declare, in distinct and unequivocal terms, that they have settled and ascertained the damages to be $500, or any other sum to be paid by either failing to perform, it seems obsurd for a court to tell them that it has looked into the contract and reached the conclusion that no such thing was intended; but that the intention was to name the sum as a penalty to cover any damages that might be proved to have been sustained by a breach of the agreement. Still, certain rules have crept into the law that are supposed to control the construction of contracts of this character, until in the view of some it has become difficult, if not impossible, to support an agreement for liquidated damages in cases where the amount ascertained by the parties seems disproportionate to the conjectured actual damage.

"The present was a contract for the sale and transfer of real estate, where the damages resulting from a breach

would be uncertain in their amount; and it is not to be supposed that the parties were not at least as well able to estimate the value of the bargain and appreciate the consequences of failing to obtain the land on the one hand or the stipulated consideration on the other, as either judges or juries. The damages for non-performance were liquidated and fixed if the language used by the parties to a contract can, in any case, fix the amount. It is precise and explicit leaving nothing for construction or intendment. The parties, declare in language not capable of being misunderstood or misinterpreted, that they have ascertained and liquidated the damages at two thousand dollars, to be paid by the party failing to perform the agreement to the injured party. If they could do this, that is the sum to be treated as the measure of damages. That they could do it as respected a contract like the present, is clear from numerous adjudications and upon principle. In Kemble v. Farren (6 Bing. 141), a case often cited on the question whether the sum named is to be treated as liquidated damages or as a penalty, Chief Justice Tindall said, that if the clause fixing the sum for liquidated damages "had been limited to breaches which were of an uncertain nature and amount, we should have thought it would have the effect of ascertaining the damages upon any such breach;" "for," he observed, "we see nothing illegal or unreasonable in the parties, by their mutual agreement, settling the amount of damages uncertain in their nature at any sum upon which they may agree." Damages resulting from the breach of any contract, except for the payment of money, when the law liquidates and fixes them, are uncertain in their nature and amount; and whether they may be accurately ascertained with grater or less difficulty by the testimony of witnesses to the point, cannot change this character of uncertainty, or prevent the application of the rule that in such a case, the parties having liquidated the damages at a definite sum, they will be regarded as having so intended, and the sum fixed to be treated as the measure of compansation."

In Noyes vs. Phillips, 60 N. Y., 408, the words of the parties agree to exchange real estate within a specified time "or *forfeit* the sum of $500." The court said they should hesitate to hold it a penal bond. "The word 'forfeit' is not conclusive. A fundamental rule upon this subject is that the words employed must in general yield to the intention of the parties as evidenced by the nature of the agreement, the amount of the sum named and all the surrounding circumstances."

In Hamaller vs. Schoers. 49 Mo., 406, the court expresses the same views as above.

Watts' executor vs. Sheppard, 2 Ala., 425. "The terms 'penal sum,' 'liquidates damages,' etc., are not conclusive to show the true character of the sum agreed to be paid, in the event of a non-performance of a contract."

Williams vs. Green, 14 Ark., 315, the court at p. 321, says: "The indications given by the form of the contract on the expressions used of an intention to stipulate the damages or *to reserve a penalty merely*, are not conclusive, and may be controlled by a contrary intention manifestly appearing from the tenor of the instrument and the object the parties must have had in view."

And at p. 327, "where the damages are at all uncertain or unliquidated, the parties ought to be allowed to anticipate and stipulate them if they choose to do so. Whenever courts attempt to make a distinction among contracts of this class, where no uniform or intelligent rule can be laid down to govern the distinction, they not only assume a most vexatious jurisdiction to reform the contracts of weak or sanguine men, but it tends to impair the confidence which all men ought to have in the obligation of contracts."

Hamilton vs. Overton, 6 Blackford, 206: "Hamilton covenanted with Overton et al., that within twenty days

he would procure and deliver to them the certificates of A. and B., officers of a bank, that there had been shown to them (A. and B.) three notes signed by Hamilton for $1,587, dated July 1, 1840, which notes they (A. and B.) considered good, and Hamilton stipulated that if he failed in the above undertaking he would pay Overton et al., $500 liquidated damages."

The court said, at p. 208: "In this case there is but one covenant, and from its nature the damages for a violation of it are entirely uncertain, nor does it appear from the record how they could well be ascertained by evidence. The consideration which induced the undertaking is not shown. We know only what the covenant was, that it was broken, and that the parties to it have themselves agreed upon the amount of damages to be paid for its breach. Indeed it is difficult to conceive from the facts disclosed what motive could have influenced them in making such a contract"—and the court held it liquidated damages.

Chrisdee vs. Bolton, 5 Carrington & Paine, 240, the words of the bond were, "under the penal sum of £500, the same to be recovered as and for liquidated damages."

Best, C. J., at p. 243, says: "In this case the sum of £500 is to be paid for the doing of one thing only, viz.: Setting up a victulling house within one mile of the house transferred to the plaintiff. It is called a *penal* sum, and I will admit the parties considered it something more than compensation, but they have agreed that this penal sum shall be recovered at and for stipulated damages. When defendant has so agreed, that if he ever did what it has been proved that he did, he would pay £500, what right has he now to say that the verdict against him ought not to be this amount? The verdict must therefore be taken for the whole sum."

Fisk vs. Fowler, 10 Cal., 512: Plaintiff bought a

vessel from defendant, paid a portion of the price and took possession. At the time she was sailing under a license to defendant, but was registered in the name of another. Defendant agreed to deliver, in twenty days, a good title and register of the vessel, and as security executed a bond "in the full and just sum of $2,000."

Terry, J., said, at p. 517: "This is one of those cases in which it is difficult, if not impracticable, to estimate the exact amount of damages suffered by the failure of defendant to comply with his contract, and we think the amount of the bond should be considered as liquidated damages within the rule laid down in Navigation Co. vs. Wright, 6 Cal., 258."

In Streeter vs. Bush, 25 Cal., 71, the court said: "Where the contract contains both the terms 'penalty' and 'liquidated damages,' as applied to the gross sum to be paid, or equivalent terms; or where it contains neither of them, the court will ascertain the intention of the parties from the whole instrument as it would in any other agreement. * * * * If the damages are uncertain and incapable of estimation, otherwise than by mere conjecture, the gross sum will be regarded as liquidated damages." The opinion declares that courts can not make bargains for parties nor modify or reform their contracts under the vague notion of relieving them from the hardships of contracts into which they have willingly and knowingly entered.

Lingley vs. Cutler, 7 Conn., 295, the court said: "Where it is agreed that if a party do or omit something, which may be injurious to another, a sum shall be paid, this sum may be considered liquidated damages in all cases where the damages are uncertain and depend on the discretion of the jury. In such cases, the parties may stipulate for the consequences of the breach of the contract." There the defendant agreed if he violated the contract "to pay the plaintiff the sum of $150." Held stipulated damages.

Sparrow vs. Paris, 7 H. & N., 594. Defendant agreed that if plaintiff would ship certain goods on board the "A" vessel for Havana, the defendant guaranteed and promised "said vessel should and would sail with, if not before, any other vessel in the berth for Havana, on the 11th of November, 1859 (the ship 'S' alone excepted), under *penalty* of forfeiting one-half the freight of the said goods."

A breach was proven, but no actual damages. The court said (p. 598), "Is this a sum of money recoverable? Is it a penalty or liquidated damages? We think it is recoverable. It is a sum payable on *one* event. It is not a sum to secure the performance of several matters. This is the distinction on which the question turns. The names the parties give the money—penalty or liquidated damages—are immaterial."

Duffy vs. Shocky, 11 Ind., 70. Plaintiffs bound themselves in a *penalty* of $1,000 not to start a marble-shop within a certain territory.

The court held that as the damages for a breach of the agreement could not be otherwise than uncertain, "that the amount named should be considered as the measure of damages agreed upon by the parties," * * * "and that the word 'penalty' should not conclusively control the contract, as decided in Sainter vs. Ferguson, 62 Eng. Com. L. Rep., 716.

Reine vs. Weber, 47 Ill., 46. Where the damages are uncertain, and no fraud has been practiced, "it becomes a matter with which courts cannot interfere, and furnishes the only measure of damages."

Gobble vs. Snider, 76 Ill., 158. "The written contract between the parties to this suit obligates them to exchange farms. It contained a provision if either failed he should *forfeit* and pay, as damages to the other,

$1,500." * * * "Where the agreement is in the alternative, to do a particular thing or pay a given sum, the court will hold the party to have had his election, and compel him to pay the money." Held stipulated.

Downey vs. Beach, 78 Ill., 53. Note to draw 10 per cent interest till due, and then 30 per cent as liquidated damages. Held liquidated. "In such cases the penalty is liquidated damages fixed by the solemn agreement of the parties." * * * "When made for the sole purpose of securing prompt payment, and understandingly entered into, such contracts are valid at law, and may be enforced."

See also Field on Damages, 155, 1st Sutherland on Damages, 475 to 520.

While it is true the defendant in error acknowledges himself bound in the penal sum, yet he also binds himself to pay the same as liquidated damages.

The whole bond and the facts and circumstances surrounding the parties at the time of its execution, when looked at in the light of the above authorities, irresistably lead to the conclusion that the parties intended the amount of $10,000 to be the fixed and agreed amount the defendant in error was to pay for a violation of the conditions of the agreement, and when we consider that there was but *one* thing to be done, and also that the damages for a failure to do that one thing were difficult, if not impossible to calculate, the reasoning of the courts, in the above cases, fastens the conclusion that this bond must be held to be one for stipulated or liquidated damages.

II.

We contend that on the law and evidence in this case the plaintiff in error is entitled to the full amount

claimed in the petition. There was a total failure on the part of the defendant in error to perform the condition of the bond, and the damages suffered by the plaintiff in error fully equals the sum sued for.

Let us first consider what the defendant in error bound himself to do; and second, what benefit would necessarily have resulted to the plaintiff in error had the defendant in error performed the conditions of the bond; and third, the loss which the plaintiff in error has sustained in consequence of the breach of the bond.

First, then; What did the defendant in error agree to do?

The condition of the bond was, that parties holding the debts and claims against the plaintiff in error should "Acquit, release and discharge the said Moses C. Bignall within one year from the date hereof, of all and singular the debts and claims aforesaid, that have been assigned to them or either of them, by good and sufficient releases in writing, to be made by them and delivered by them to the said Moses C. Bignall." If now we look to the meaning of the operative words, we will see that "Acquit" is a transitive verb, and means "To set free; release; to discharge from an obligation." Release is also a transitive verb, and means to "free from an obligation or penalty, as to release one from a debt; from a promise or covenant." [Web. Dic.]. Bouvier says, "Release means to give up, discharge or abandon a cause of action." "Discharge," according to Webster, means, "To pay, as to discharge a debt, a bond, a note." "To send away, as a creditor, by the payment of what is due him. He discharged his creditors. To free from claim or demand, to give acquittance to, or a receipt in full as to a debtor. The creditor discharged his debtor." Bouvier says, the discharge of a contract means "The act of making a contract or agreement null." He then adds "Contracts

may be discharged by first, Payment; second, Accord and satisfaction; third, Release."

If we look further to the condition of this bond, we will see that the acquittance, discharge, and release of the plaintiff in error of all and singular the debts, etc., was to have been "By good and sufficient release in writing." By good and sufficient is meant valid, legally firm, not weak or defective; complete in its kind, having the qualities best adapted to its design and use. Such a release in writing on the part of the Gould Manufacturing Company, Hannah B. Gould, and Angus McDonald, was to have been made and delivered by them to the plaintiff in error, within one year from the date of said bond; that is by April 11, 1880.

There is a marked distinction in being released by the act of the creditor, and a release by operation of law. If a party who is discharged by operation of law, makes a new promise he thereby waives such discharge, and becomes at once liable for the old debt. Not so when a creditor to whom a debt is due, voluntarily, for a sufficient consideration, or under seal with no consideration in fact, releases his claim, the obligation thus relesed becomes *forever extinguished and will not support a fresh promise of payment, nor is it in any way revived thereby.*

Bishop on Conts., 446-450.
Valentine vs. Foster, 1 Met., 520.
Smith vs. Richmond, 19 Cal., 483.
Way vs. Sperry, 6 Cush., 241.

In Smith vs. Richmond, 19 Cal., 483, Field, then the Chief Justice of California, said: "We think, in these cases (meaning some cases referred to in the opinion), too great effect is given to the discharge of the debtor. The discharge does not extinguish the debt in any other sense than it relieves the debtor from any legal obligation to pay the same, that is from compulsory

proceedings in a Court of Justice. The debt still exists and until paid will exist, though only binding upon the conscience of the debtor. If it were extinguished, it could not, as is well observed in Way vs. Sperry (6 Cush., 241) be renewed nor revived, nor become a consideration for a new promise. The true view, as we conceive it, is this, that the action is founded upon the original contract, and that the new promise is only a waiver of the defense furnished by the discharge."

In Way vs. Sperry, 6 Cush., 241, the Court says: "We do not hold that a note, promise or debt is destroyed by a discharge in Bankruptcy. If it were, it could not only not be renewed or revived, but it could not be a consideration for a new promise. Yet nothing is clearer on authority than that the old debt is consideration for such promise. In all the cases above mentioned, the new promise operarates as a waiver, by the promisor, of a defense which the law has furnished him against an action on the old promise or demand."

The reason for the distinction between the discharge one gets in a Bankrupt Court, and the discharge and release he gets from his individual creditors, is this, viz: When the creditors formally release the debtor, it is not a case where the law has tendered the party an advantage, which he may therefore waive, *but by the act of the parties the contract or debt has ceased to exist.*

Bishop on Cont., 451.

On authority, it is clear that the kind of a release that the defendant in error obligated himself should be made and delivered to the plaintiff in error, would have extinguished all the demands, legally and morally, held by the parties named, so that it could not have been said concerning any one of said claims or demands, that there still existed a moral obligation on the part of the plaintiff in error to pay them. Nor could any sentiment,

which the plaintiff in error may express in the future, be tortured or construed into a new promise to pay these old debts. And besides this, had such releases been executed, his assets would have been ample to have paid all his other creditors in full. As it now stands, no one has been paid in full. The moral obligation still rests upon him to pay many thousand dollars.

We submit that the defendant in error cannot escape his legal obligation by saying that long after he committed a breach of the bond, plaintiff in error obtained a discharge under the bankrupt act, because such discharge is not co-extensive with a good and sufficient release in writing, made and delivered by the creditors. The actual amount of money from the payment of which the plaintiff in error was entitled to be released, by the parties named in said bond, exceeds forty thousand dollars; less than 50 per cent of said claims were paid, so on this basis, after applying the dividends, there was more than twenty thousand dollars left unpaid on these claims, and the plaintiff in error has never received from the parties, to this day, such good and sufficient release in writing.

The agreement to acquit, release and discharge, to which the plaintiff in error was entitled by the terms of the bond, implied, beyond dispute, that Gould would pay and satisfy the parties named in the condition, and cause them by good and sufficient release to extinguish their claims forever against the plaintiff in error, so that no obligation, legal or moral, could any longer exist against him on account of said demands and claims. His utter failure to do this entitled the plaintiff in error to recover against him substantial damages, and the true measure is the amount of the claims and demands which the defendant in error, by the terms of the bond, obligated himself to pay, satisfy and discharge within one year, but which he never did satisfy, pay, or cause to be acquitted, released or discharged, as to the plaintiff in error.

The authorities are uniform that the measure of damages in such a case, is the sum which the obligee agreed to pay and discharge, and failed to pay or discharge.

As illustrating this point we refer to the following authorities.

In Ham vs. Hill, 29th Mo. 275, the sylabus reads: "A and B were partners. A transferring his interest to B and retiring from the firm took from the latter a bond of which the following is the condition:' Whereas the said B having purchased the interest of the said A in the said firm of A and B, in the carriage business in the city of B, Mo., and has agreed with the said A to assume all the partnership liabilities of the said firm incurred between April 1st, 1858, and July 1st, 1858, and to pay the same whenever payment is demanded legally by the creditors of the said firm; now if the said B shall keep said agreement and pay said debts in the manner and form above described, then this bond to be void, otherwise to remain in full force and virtue. Held, That this was not merely a bond of indemnity to A; that the obligation thereby created was not contingent upon A's being compelled to pay, or his actually paying to the creditors of the firm the debts embraced within the bond; that the right of action accrued to A as soon as B failed to pay those debts on demand of the creditors."

In writing the opinion in the above case, Ewing, J. at page 279, says: "If A for a sufficient consideration enter into a covenant with B to pay to the creditor of B a given sum at a specified time or when it should be legally demanded, there could be no doubt of the meaning and legal effect of such an instrument, and that the default of A to pay at the time agreed upon would give to B an immediate right of action without waiting till he had made payment of the debt."

The court slso held, that the amount of the judgment

in the above case would be the amount of the debts provided for in the bond.

In Port vs. Jackson, 17th Johnson, 239, the sylabus reads: "B being posessed of a term of years in England, of which 1690 years remained unexpired assigned the same to P for 1600 years at a yearly rent, etc. P sold and assigned the same to the defendant who covenanted to perform, etc. All the covenants contained in the indenture and demise from B to P, on the part of P to be performed, etc. In an action of covenant by P against the defendent to recover the amount of the rent alleged to be due and unpaid to B for above twenty-four years, the defendent pleaded, that before any rent accrued or was payable to lessor he assigned all his interest, term, etc. to G who entered into the premises, and was accepted by B as his tenent. Held, On demurrer that the plea was bad. That the covenant on the part of the defendent was a positive and express covenant to pay the rent, as it became due to the lessor and on which the plaintiff remained liable on his covenant with B, by privity of contract notwithstanding the assignment by the defendant to G and also the acceptance of him by B as his tenant. That it is not necessary that the plaintiff should allege in his declaration that he has been obliged to pay the rent to B, or had been damnified for the defendent's covenant has been broken by the non-payment of the rent, and non-damnificatus is no answer to the plaintiff's declaration; and that the plaintiff was therefore entitled to recover the whole rent in arrear and unpaid, for which he was liable on his covenant with the lessor."

In Jackson vs. Post, 17th Johnson 479, the syllabus reads: "B leased a lot of ground to the plaintiff who covenanted to pay B the yearly rent of 32 pounds, 17 shillings, in four equal payments, etc. The plaintiff afterwards assigned the same premises to the defendant subject to the payment of the rent to B, etc., and the de-

fendant covenanted with the plaintiff to perform and keep all the covenants, etc. mentioned in the lease from B to the plaintiff. The defendant having suffered the rent to remain unpaid and in arrear to B, the plaintiff brought an action against him for a breach of his covenant in not paying the rent to B. Held, That this was not a mere covenant of indemnity, but for the payment of the rent by the defendant to B; that the breach was well assigned by alleging that the defendant had not paid the rent, etc. A plea of non-damnificatus is no answer to the declaration, upon an undertaking of the defendant to pay a sum of money for which the plaintiff was bound."

In Wicker vs. Hoppock, 6 Wall., 94, the court says: "The general rule is that when a wrong has been done and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former shall be measured. The injured party is to be placed as near as may be in the situation he would have oocupied if the wrong had not been committed. In some instances he is made to bear a part of the loss, in others the amount to be recovered is allowed, as a punishment and example to exceed the limits of a mere equivalent. * * * *

"There is a well settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of damages is the full amount agreed to be paid."

"In a note of Sergeant Williams to Cutler et al., vs. Southern et al., it is said that in all cases to a covenant to indemnify and save harmless the proper plea is non-damnificatus, and if there is any injury the plaintiff must reply it, but that this plea cannot be pleaded when the *condition is to discharge or acquit* the plaintiff from such bond or other particular thing, for the defendant

must set forth affirmatively the special manner of performance"

In Sutherland on Damages, Vol. II., p. 603, the author says: "In all cases of conditions or covenants to indemnify and save harmless from damages, the proper plea is *non-damnificatus*, and then the maintenance of the action depends on the proof of damages. But it is otherwise where the condition or agreement is *to discharge or acquit* the plaintiff from some particular thing; for there the defendant must set forth affirmatively the special manner of performance."

"The authorities are by no means uniform in the construction of agreements of similar nature and words, in determining whether they shall be deemed to be agreements of indemnity merely, or are agreements against the existence of a certain condition, or requiring some positive act of performance. If the contract *deviates in the least from a simple one to indemnify against damages, even though indemnity is the sole object of the contract*, and where actual loss may be sustained in consequence of a breach, it is generally treated as belonging to the latter class, and damages are recoverable accordingly."

In Thomas vs. Allen, 1 Hill, 146, the court says: "The fair inference to be drawn from the defendant's bond seems to be that the plaintiff was in some way bound to pay the debt which Steele owed to Jonson. If it was not so, if the plaintiff had no interest in having the debt paid when it should be, why did he take the defendant's bond to secure the payment? Again, the defendant agrees that he will pay the plaintiff a sum of money by satisfying the bond and mortgage to Jonson. If the satisfaction of those securities would be payment to the plaintiff, and both parties concede that it would, then the plaintiff must have either been bound for or had a direct interest in the extinguishment of Steele's debt.

"The case then comes to this, the defendant agrees he will pay a sum of money when it becomes due, for which the plaintiff is bound to some third person, and that he will save the plaintiff harmless, etc. This is more than a bond of indemnity, and the breach is well assigned by showing that the debt was not paid to Jonson at the day. Sergeant Williams says that non-damificatus cannot be pleaded where the condition is to discharge or acquit the plaintiff from such a bond, or other particular thing, for the defendant must set forth affirmatively the special matter of performance."

We respectfully submit that on this theory of the case, under the pleadings and evidence, the plaintiff in error is entitled to recover $10,000, the amount claimed in the petition.

Second; What benefit in the fund would there have accrued to the plaintiff had there been no breach?

The evidence shows that there came into the hands of the assignee in bankruptcy $23,109.54, and that all of the debts except three or four thousand dollars, before April 11th, 1880, the date within which the defendant was bound to perform the conditions of the bond, had been acquired by the persons from whom the plaintiff in error was entitled to receive the good and sufficient release in writing. It further shows that no part of the fund was paid out of the hands of the assignee until the fall of 1881. If the defendant in error had kept and performed the conditions of the bond, then no part of the claims and demands held by the parties, who were to have executed said releases could have shared in the fund in the hands of the assignee, because such formal *acquittance*, *release* and *discharge* to the plaintiff in error would have extinguished said demands. Though it is true that these claims, at the date the petition was filed for bankruptcy, were good and valid, yet it is equally true that payment by the bankrupt, after the

petition was filed, and before the funds in the hands of the assignee were distributed, would prevent these claims from receiving any part of the assigned estate. Indeed, anything which would have prevented the holder of these claims from successfully prosecuting them to judgment against Bignall, had he failed to procure a discharge, would have prevented his proving them against the estate, or, if said claims had been already allowed, it would have been good and sufficient grounds for expunging them. The true test of a provable claim being this, viz: That it was such a claim, at the time of the bankruptcy, as might have been forced into a judgment against the bankrupt, and, that nothing has transpired since the bankruptcy, by act of the creditor, cutting off his right to enforce such claim by judgment against the bankrupt, in the event he fails to obtain his discharge.

As we have already said, the acquittance, release and discharge to which Bignall was entitled by the bond, would have placed all these claims (held by the parties named in the condition of the bond), in the same category as if Bignall had actually paid them in full. In this event, after all the other creditors had been paid in full, there would have remained over $10,000 in the hands of the assignee, and the plaintiff in error, under the law, would have been entitled to this surplus. It follows, therefore, from this theory of the case, that the plaintiff in error would have reaped a benefit of ten thousand dollars, had not the defendant in error made default in his bond. It is clear, that any sum that the plaintiff in error would have received had there been no default, constitutes a solid element in estimating his damages, when it appears that he was deprived of it in consequence of such default.

Respectfully submitted.

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With whom is

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